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12
13 IN THE UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 **PEOPLE OF THE STATE OF CALIFORNIA**
17 ***ex rel.* EDMUND G. BROWN JR.,**
18 **ATTORNEY GENERAL OF THE STATE OF**
CALIFORNIA,

19 Plaintiff,

20 **v.**

21 **ENVIRONMENTAL PROTECTION**
22 **AGENCY,**

23 Defendant.

Case No.: C 08-00735 SC

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR
VAUGHN INDEX**

Date: April 25, 2008
Time: 10:00 a.m.
Place: Courtroom 1, 17th Floor
Judge: Hon. Samuel Conti

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25 In compliance with N.D. Local Rule 7-4(a), plaintiff People of the State of California,
26 by and through Edmund G. Brown Jr., Attorney General of the State of California, submits this
27 Memorandum of Points and Authorities in Support of Plaintiff's Motion for a *Vaughn* Index.

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1 **I. INTRODUCTION**

2 Plaintiff filed this case to compel the Environmental Protection Agency (“EPA”) to respond
3 to the People of the State of California’s request for records under the Freedom of Information
4 Act, 5 U.S.C. §552, *as amended* (“FOIA”). Under FOIA, to justify withholding information
5 once litigation has begun, an agency may be required to produce a “*Vaughn*” index, which
6 correlates withheld documents or withheld portions of documents with detailed justifications for
7 their withholding. It is proper for the Court to order defendant to produce and submit a *Vaughn*
8 index promptly.

9 **II. BACKGROUND**

10 In December 2005, the California Air Resources Board (“CARB”) requested from EPA a
11 waiver of preemption under section 209(b) of the Clean Air Act, 42 U.S.C. § 7543(b), for
12 CARB’s regulations to control greenhouse gas emissions from new motor vehicles (“GHG
13 Regulations”), adopted in 2005 to implement the Pavley law (Assembly Bill 1493). The Clean
14 Air Act gives California express authority to set its own emission standards provided it receives
15 a waiver of preemption from EPA. The GHG Regulations are the most significant regulations
16 currently in existence anywhere in the nation to address global warming, and at least twelve
17 states would have been free to implement the same regulations if California had received the
18 EPA waiver.

19 Despite demonstration of the severe effects of global warming on California’s population,
20 economy, and environment, EPA failed to take action on the waiver request for two years. On
21 December 19, 2007, EPA Administrator Stephen Johnson rejected California’s request to
22 implement regulations on tailpipe emissions of greenhouses gases, principally carbon dioxide.
23 The decision represents the first time EPA has denied a request by California to impose its own
24 pollution rules: it previously has granted the state approximately 50 waivers.

25 On December 27, 2007, plaintiff sent a FOIA request to EPA seeking the disclosure of
26 records related to the waiver denial, “including communications within and outside the federal
27 government related to the waiver request, drafts of the decision document, analyses comparing
28 emission reductions, fuel savings, or fuel economy increases that could result from

1 implementation of the GHG Regulations to those that could result from implementation of
 2 federal legislation, and briefing materials related to the waiver request that were prepared for the
 3 Administrator or senior staff of EPA, including, but not limited to, the PowerPoint presentation
 4 referenced in the December 20, 2007 Washington Post article entitled ‘EPA Chief Denies Calif.
 5 Limit on Auto Emissions.’” Complaint filed January 31, 2008 (“Complaint”), ¶ 7 and Ex. B; *see*
 6 Answer filed March 3, 2008 (“Answer”), ¶ 7. EPA failed to produce any responsive records
 7 prior to the filing of the Complaint. Complaint, ¶ 9; Answer, ¶ 9. To date, EPA has failed to
 8 respond to the request or to provide an index to the documents withheld. Zuckerman Decl., ¶ 2.

9 Defendant’s failure to date to provide a detailed justification of the basis for the exemptions
 10 claimed, whether by index or otherwise – or indeed to respond to the request *at all* – prompted
 11 the filing of this motion.

12 **III. ARGUMENT**

13 The Freedom of Information Act requires that government agencies shall, on receipt of a
 14 proper request, promptly disclose their records unless those records are subject to withholding
 15 pursuant to one of FOIA’s exemptions. The agency must respond to the request within 20
 16 working days. 5 U.S.C. 552(a)(6)(A)(i). Once litigation has begun, a court may require an
 17 agency to submit an index correlating the documents or portions of documents withheld with
 18 detailed justifications for their withholding. *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C.Cir.
 19 1973), *cert. denied*, 415 U.S. 977 (1974); *see also, e.g., Lion Raisins Inc. v. U.S. Dep’t of*
 20 *Agriculture*, 354 F.3d 1072, 1082 (9th Cir. 2004).

21 Since *Vaughn* was decided, “government agencies seeking to withhold documents requested
 22 under the FOIA have been required to supply the opposing party and the court with a ‘*Vaughn*
 23 index,’ identifying each document withheld, the statutory exemption claimed, and the
 24 particularized explanation of how disclosure of the particular document would damage the
 25 interest protected by the claimed exemption.” *Wiener v. Federal Bureau of Investigation*, 943
 26 F.2d 972, 977 & n.4 (9th Cir. 1991) (citations omitted), *cert. denied*, 505 U.S. 1212 (1992); *see*
 27 *also, e.g., Bay Area Lawyers Alliance for Nuclear Arms Control v. Department of State*, 818 F.
 28 Supp. 1291, 1295 (N.D. Cal. 1992). “The purpose of the index is to afford the FOIA requester a

1 meaningful opportunity to contest, and the district court an adequate foundation to review, the
2 soundness of the withholding.” *Wiener*, 943 F.2d at 977 (citations and internal quotation marks
3 omitted). It is one method (like submission of another form of accounting for the withheld
4 documents, such as an affidavit) of ensuring that the requesting party and the deciding judge
5 have enough information to determine whether the government agency properly withheld the
6 documents sought. *Schiffer v. Federal Bureau of Investigation*, 78 F.3d 1405, 1408-09 (9th Cir.
7 1996).

8 Just as important as the production of a *Vaughn* index, however, is its production in a timely
9 fashion. Production of an index at the outset of the litigation will allow time for the plaintiff to
10 litigate the adequacy of the index if necessary, and it should enable the parties to narrow the
11 scope of the issues to be resolved on their cross-motions for summary judgment. Plaintiff has
12 requested that defendant provide such an index, but to date EPA has not agreed. Zuckerman
13 Decl., ¶ 3. It is proper for the Court to order such an index be prepared and filed promptly, given
14 FOIA’s policy of expedited handling of document requests. *See, e.g., Coastal States Gas Corp.*
15 *v. Department of Energy*, 644 F.2d 969, 972 (3d Cir. 1981).

16 **IV. CONCLUSION**

17 Plaintiff made its FOIA request to EPA over 2 ½ months ago. Plaintiff requests that the
18 Court grant this Motion for a *Vaughn* Index, and order defendant to file such an index, and
19 produce all documents not subject to a valid claim of exemption, no later than 14 days from the

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1 date of the Court's order.

2 Dated: March 21, 2008

Respectfully submitted,

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